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Via Email

NYS Department of Environmental Conservation  
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Albany, NY 12233-3500  
ATTN: Michelle Tompkins  
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Re: Comments on I SD Clarifying Rule:  
Proposed Clarification of Class I and Class SD Best Usages – Amendment to 6  
NYCRR Parts 701.13 and 701.14, "Classifications – Surface Waters and  
Groundwaters"

Dear Sir or Madam:

The City of New York (City) submits these comments regarding the above-referenced Proposed Clarifying rule (Clarification). The New York City Department of Environmental Protection (DEP), a municipal agency in New York City, is the largest water and wastewater utility in the nation and manages the City's 14 wastewater resource recovery facilities (WRRFs) that treat an average of 1.3 billion gallons of wastewater a day to remove bacteria and other pollutants from wastewater. In wet weather, DEP's system can treat up to 3.5 billion gallons per day of combined storm and sanitary flow collected through 7,500 miles of sewers and 96 pumping stations. In addition to the WRRFs, DEP also operates four combined sewer overflow (CSO) storage facilities in addition to other CSO control facilities and is in the process of constructing and planning additional CSO facilities.

Since 2002 DEP has invested nearly \$10 billion in new infrastructure projects to reduce pollution and enhance water quality in and around New York City. The City shares the New York State Department of Environmental Conservation's (DEC) goals of improving water quality in and around New York City, and DEC has recognized that substantial water quality improvements have been achieved in recent decades.

As noted in the Regulatory Impact Statement for the Clarification, DEC's intent with the Clarification is to clarify the intent of the 2015 amendments to 6 NYCRR Parts 701 and 703 (2015 amendments) that the best usages of Class I and Class SD waters were and remain, "secondary contact recreation and fishing" and "fishing" respectively. The following amendments are proposed in the Clarification: i) remove language in the definition of Class I saline surface waters that, "in addition, the water quality shall be suitable for primary contact recreation, although other factors may limit the use for this purposes." and; ii) remove language in the definition of Class SD saline surface waters that, "in addition, the water quality shall be suitable for primary contact recreation,

although other factors may limit the use for this purposes." The City supports the Clarification and the removal of the specified language.

The City previously commented in response to the 2015 amendments, that the City supported the preservation of the Class I and Class SD use classifications. At that time and continuing today, while many areas in the City are appropriate for swimming, certain waterbodies in the City function as urban tributaries where swimming may be unsafe due to factors other than pathogens. As DEP has documented, and as DEC has classified these waterbodies, primary contact uses are inconsistent with their status as working waterbodies with active navigational uses or other constraints, such as bulk heading, low flows, or security restrictions. These urban tributaries pose very small risk of exposure to humans in areas where swimming is not a designated, appropriate or permitted use. The City continues to support DEC's efforts to improve water quality in waterbodies across New York City, including those that are not designated for primary contact recreation. Accordingly, DEP supports the Clarification and the recognition by DEC that the uses of Class I and Class SD waterbodies remain secondary contact recreation and fishing and fishing respectively.

The City notes that the Clarification is supported by the CWA, provides, with respect to establishing WQS, that "such standards shall be established taking into consideration [the waters'] use and value for public water supplies, propagation of fish and wildlife, recreational purpose, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." CWA § 303(c)(2)(A). EPA's regulations set forth the requirements for establishing water quality criteria, and define water quality "criteria" as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) *emphasis added*. The regulations further provide, "States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." 40 CFR § 131.11(b)(1) *emphasis added*.

As noted above, the City supports the Clarification. DEP seeks to prioritize its investments in improving water quality in those waterbodies with active recreational uses or which have a reasonable potential for such uses in the foreseeable future, and believes the Clarification reflects this approach in a manner consistent with the Clean Water Act. The City appreciates DEC's consideration of these comments.

Sincerely,

  
Matthew Kudelman  
Assistant Counsel